Office-Supreme Court, U.S.
FILED
AUG 7 1968
JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

No. 392

DONALD SWAN,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No._____

DONALD SWAN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the conviction of the petitioner, on an indictment charging one count of conspiracy (in violation of 18 USC 371) and twelve counts of mail fraud (in violation of 18 USC 1341).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is printed in the appendix and has not been officially reported. There was no opinion in the United States District Court for the Eastern District of New York.

JURISDICTION

The judgment of the United States Court of Appeals was entered July 3, 1968. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Is it prejudicial error to admit into evidence, under the Business entry rule (28 USC 1732), "test sheets" prepared by a Post Office Department Inspector, as "an investigative aid" in connection with the investigation of complaints received by that Inspector?

2. Is it error, prejudicial to the defendant and requiring a reversal, to permit the exhibition to the jury of photographic enlargements of various handwriting and handprinting samples, which enlargements are denominated by conclusory statements as to their quality. The conclusory statements being supplied by the prosecuting authority and printed in large letters above the enlargements contained on the charts?

3. Is it prejudicial error, for the Court to supply each member of the jury with a paper denominated as a "questionnaire," on which the members of the jury might record their verdict, when such "questionnaire" contains printed information with reference to the transactions charged as counts in the indictment, but does not contain information as to all the essential elements of the crime?

4. With reference to a document admitted into evidence pursuant to the "business entry rule" (28 USC 1732), is it proper to permit an inference to be made, without further evidence, as to the identity of the person who printed the information on the document so admitted?

5. In the instant case, did the Court err in admitting into evidence the documents known as the "Columbia University Records," to be used as an exemplar of the defendant's handprinting for purposes of comparison with other disputed items of handprinting?

STATUTES INVOLVED

The indictment charged substantive violations of Title 18, §1341 of the United States Code. It also charged a conspiracy under Title 18, §371 of the United States Code, to violate the provisions of Title 18, §1341 of the United States Code. The pertinent statutes provide as follows:

§1341. Frauds and swindles.

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article,

or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

§371. Conspiracy to commit offense or to defraud United States.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.

"If, however, the offense, the commission of which is the

object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Additionally, Title 28, §1731 and §1732 of the United States Code are statutes involved in this case. They provide as follows:

§1731. Handwriting

"The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person."

§1732. Record made in regular course of business; photographic copies.

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event. If made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence,

or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

"(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in

evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence."

STATEMENT OF THE CASE

The petitioner was convicted in the United States District Court for the Eastern District of New York, on all counts of a 13-count indictment, one count of which charged the petitioner with conspiracy (18 USC 371) and 12 counts of which charged petitioner with mail fraud (18 USC 1341).

In substance, under the first 12 counts of the indictment, it was alleged that the defendant, together with another defendant (Andrew J. Portoghese), knowingly and willfully devised a scheme or artifice to defraud and to obtain property by means of false and fraudulent pretenses and representations from various companies. It further alleged that, as part of the said scheme and artifice, that the two defendants would send order forms by mail to various companies, using false and assumed names, ordering merchandise and

property from the companies. It also alleged that the companies were induced to forward the merchandise ordered, to the defendants, at various addresses.

By count thirteen of the indictment, the defendant and Andrew J. Portoghese were charged with conspiracy to violate the mail fraud statute, by the use of false and fraudulent pretenses and representations, as alleged in the first twelve counts of the indictment.

Defendant was sentenced to serve a term of imprisonment for a period of three years, upon his conviction.

THE DEFENDANT, ANDREW J. PORTOGHESE

ANDREW J. PORTOGHESE, named with the defendant, DONALD J. SWAN in the indictment, plead guilty to one count of mail fraud, after the trial had begun. Thereafter, he appeared as a witness for the Government, giving testimony limited in its scope (R. 329-336).

PORTOGHESE, though named as a defendant in the indictment, and having plead guilty to one count in the indictment, was not questioned with reference to the facts of the indictment. He gave no testimony, in support of the charges made by the Government. He testified only as to the purported handwriting of the defendant SWAN, testifying, in essence, that "I am not certain" that the disputed handwriting was the handwriting of the defendant SWAN (R. 336).

THE WITNESSES

Of the nineteen witnesses called by the Government, one (MAX MEYER) testified as to the receipt of packages allegedly caused to be mailed, pursuant to the conspiracy. MEYER gave no testimony linking the defendant SWAN to the conspiracy or to the substantive offenses. Eight witnesses testified that they were employed by private businesses and had, in response to various order cards, forwarded various items of merchandise, in accordance with instructions on the cards received by them. The order cards and blanks were introduced into evidence. As to the order cards claimed to have been prepared and mailed by the defendant SWAN, each was in block printing. None of the order cards or blanks introduced bore the name of either defendant. Each called for delivery of the ordered merchandise to some name, other than that of the defendant SWAN.

Six employees of the Post Office testified that they made delivery of various items of merchandise, addressed to persons other than the defendants SWAN and PORTOGHESE, to the office of the defendant PORTOGHESE and to the home of the defendant SWAN.

The witness SEYMOUR, an employee of Columbia University, served as the conduit for the introduction into evidence of various academic records of the defendant SWAN. The witness DISHINGTON, a bank employee, served as the conduit for the introduction into evidence of various bank records of the defendant PORTOGHESE.

The witness PORTOGHESE, also a defendant, was called to the stand to identify

the block printing contained on the Columbia University records as that of the defendant SWAN. He testified that "I am not certain" that the printing on the records was that of the defendant SWAN.

The witness SANG, an admitted handwriting expert, was called to the stand to testify and did testify that the Columbia University records (Government's Exhibit 3) and various of the merchandise order forms were prepared in the same block printing.

The witness MILON, a Post Office Inspector, testified with reference to the preparation of certain "test parcels" and "test sheets", which were introduced as Exhibits 4, 5, 8 and 9 for the Government.

THE "TEST SHEETS" AND "TEST PARCELS"

The witness MILON testified that he had opened various parcels, addressed to persons other than the defendant SWAN at the address of the defendant SWAN. He said that he had examined the contents and marked them for identification (R. 111-112). Further, he testified that he had prepared forms, with reference to the "test parcels". Over the objections of the defendant, the "test parcels" were marked as Government Exhibits 8 and 9 and the "test sheets" were marked as Exhibits 4 and 5. As to the "test sheets", MILON testified that he had an independent recollection of the facts recorded thereon (R. 117). After argument and qualifying testimony (R. 120-138), the Court ruled that the "test sheets" were admissible as entries made in the regular course of

business.

THE BLOCK PRINTING EXEMPLARS

The defendant SWAN, by his plea of guilty, denied being the author of any of the cards or blanks which were the agency for the ordering of any of the merchandise claimed to have been ordered.

In an attempt to provide exemplars of SWAN's HANDWRITING, for comparison with the order blanks and cards, the Government procured the admission into evidence of the "Columbia University Records", Government's Exhibit 3. This Exhibit comprises various block printed records dealing with the defendant's academic career at Columbia University. There was no admission, by the defendant, that the block printing contained in these records was his, or, indeed, that the records pertained to the defendant.

The Columbia University records were introduced through the testimony of the witness SEYMOUR, as records kept in the regular course of business at Columbia University. The testimony of the witness SEYMOUR failed to establish that the records were block printed by the defendand SWAN (R. 52-66).

The witness SANG was permitted to give expert testimony, by way of comparing the Columbia University documents and the order blanks and cards, upon the statement of the Assistant United States Attorney that he would produce a witness who "can identify the handwriting because he knows it quite well" (R. 236-237). The Court stated that it would "allow the expert to

testify subject to the connecting testimony" (R. 236).

When the witness (and co-defendant) PORTOGHESE was called to the stand, he was unable to positively identify the block printing as that of the defendant SWAN (R. 329-336). With reference to the printing contained on the Columbia University exhibits, PORTOGHESE testified that "I am not certain" (R. 336).

Incidentally, it ought be noted that, since the order forms attributed to the defendant SWAN were block printed, the Court was concerned only with its comparison with the block printing on the Columbia University exhibits.

THE CHARTS

In connection with his testimony as an expert, the witness SANG testified with the use of Government's Exhibit 29, which purported to be a photographic enlargement of parts of the Columbia University exhibits and parts of the various order forms and blanks said to have been printed by the defendant SWAN. These charts were permitted to be used and received into evidence, over the objection of the defendant (R. 259; 265). The defendant objected to the introduction of the charts, by reason of the failure of testimony as to the method of their preparation.

In addition, objection was made on the grounds that the charts had been labeled "known" and "questioned", referring to the Government's claim with reference to the nature of the handwriting which had been excerpted onto the charts. The excerpts

from the Columbia University records were denominated as "known" examples of the defendant SWAN's handwriting.

MOTIONS

The Court denied motions, made by the defendant, at the close of the testimony as follows: A motion to strike the Columbia University exhibits, on the grounds that they had not been connected; a motion to strike the testimony of the witness SANG, on the grounds that he testified from materials which were not properly admitted into evidence; and a motion to strike the "test sheets" and "test parcels", on the grounds that they constituted inadmissible hearsay.

THE "VERDICT FORM"

Over the objection of the defendant, the Court supplied each member of the jury with a "questionnaire" form, to be used by the jury in recording its verdict (R. 403-404). A copy of that "Questionnaire" is contained in the Appendix hereto.

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the Second Circuit erred:

1. In affirming the judgment of conviction.

2. In holding it not to be prejudicial error to admit into evidence, under the business entry rule (28 USC 1732),

certain test sheets which had been prepared by a Post Office Department Inspector, as "an investigative aid" in connection with investigation of complaints received by that inspector in the course of his duties.

3. In failing to find it prejudicial error to permit the exhibition to the jury of photographic enlargements of various handwritings and handprinting samples which were denominated by conclusory statements as to their quality, which conclusory statements were supplied by the prosecuting authority and were printed in large letters above the enlargements contained on the chart.

4. In failing to find it prejudicial error for a trial court to supply each member of the jury with a paper denominated as a "questionnaire", when such "questionnaire" contained printed information with reference to the transactions charged as counts in the indictment, but did not contain all the essential elements of the crime charged by the indictment.

5. In holding that it was proper to permit the jury to make an inference, without further evidence, as to the identity of the person who printed certain information on documents admitted into evidence pursuant to the "business entry rule" (28 USC 1732).

6. In holding that it was not error to admit into evidence certain documents known as the "Columbia University Records", which were used as exemplars of the defendant's handprinting, for purposes of comparison with other disputed items of

handprinting.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The following are the reasons which are relied on by the petitioner in petitioning this Court for the allowance of a Writ of Certiorari:

1. The decision by the United States Court of Appeals for the Second Circuit, in holding that it was not prejudicial error to admit into evidence the "test sheets" prepared by the Post Office Department Inspector, is directly contrary to rules of law, as contained in statute and in the decisions of this Court. The decision of the Court of Appeals is a decision on a Federal question which is in conflict with applicable decisions of this Court.

2. The questions of federal law, in the interpretations of the business entry rules (28 USC 1732) and the handwriting exemplar statute (28 USC 1731) by the United States Court of Appeals for the Second Circuit, represent important questions of federal law which have not been, but should be, settled by this Court.

3. The decision of the United States Court of Appeals, so far as it relates to the handwriting chart exhibited to the jury and to the "questionnaire" handed to the jury by the Trial Court, so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

4. Unless this Court acts, with

reference to the errors in the Courts below, the defendant will be deprived of his liberty, in spite of the fact that grave and prejudicial errors were committed at the trial of this action, and were permitted to stand by the United States Court of Appeals.

ARGUMENT

POINT I

IT IS PREJUDICIAL ERROR TO ADMIT INTO EVIDENCE, UNDER THE "BUSINESS ENTRY RULE" (28 USC 1732), "TEST SHEETS" WHICH HAVE BEEN PREPARED BY A POST OFFICE INSPECTOR AS INVESTIGATIVE AIDS IN CONNECTION WITH THE INVESTIGATION OF COMPLAINTS RECEIVED BY THAT INSPECTOR

The "test sheets" (Government's Exhibits 4 and 5) were admitted into evidence in connection with the testimony of the witness MILON, a Post Office Department Inspector. These test sheets were admitted, as records made in the ordinary course of business of the Post Office Department, in order to show certain facts with reference to the delivery of parcels to the home in which the defendant SWAN resided. The contents of the parcels were later admitted as Government's Exhibits 8 and 9.

Apparently, the parcels, which were addressed to various names, were opened by the witness MILON before they reached the address to which they were being sent and their contents were marked. Using the "test sheets", the witness MILON, in his position as a postal inspector, made various notations with reference to the parcels and with reference to their delivery. The post office carriers who actually delivered the parcels then completed the "test sheets" and returned them to the witness MILON.

It is evident, from the testimony of the witness MILON that the "test sheets" were prepared by him and were made with a view towards litigation and for the purpose of litigation (R. 111-113; 116-117; 119-136). MILON testified that he prepared these forms in cases "where there is a failure to pay for merchandise" and "in the case of carriers. . . who might be thought to have been stealing articles. . .". He stated that "in my experience I have not had any other occasion to use them" (R. 25). While MILON testified that a prosecution does not result in every case in which "test sheets" are prepared, he also testified that they were "never used unless a prior complaint is made" (R. 127). The test sheet, which bears the printed name of the witness MILON, is obviously prepared for his sole use. An examination of the form will reveal that it is not a standard Government form. MILON testified that he knows that it is used in the "New York Division". He denied knowledge as to its use elsewhere within the Post Office Department (R. 128). He identified the forms as "an investigative aid". When asked if the "test sheets" were not used in cases "in which you see the possibility of prosecution or proceedings", the witness MILON answered that "there is always that possibility" (R. 135).

In admitting the documents, the Court ruled that they were made in the regular course of business of the Post Office and, additionally, that they were admissible as past recollection recorded (R. 136). This, in spite of the fact that the witness MILON testified that he had an independent recollection of the facts contained in the "test sheets" (R. 117).

At the conclusion of testimony, the defendant moved to strike the "test sheets" from evidence (R. 338-339). The motion was denied.

A reading of the testimony of the witness MILON indicates that the "test sheets" were prepared in connection with litigation and, consequently, were not properly admitted into evidence. United States v. Johns-Manville Corp., 231 F. Supp. 690; Palmer v. Hoffman, 318 U.S. 109, rehearing denied 318 U.S. 800; Hartzog v. United States, 217 F. 2d 706. It is an established rule of law that records of investigations and inquiries, whether conducted voluntarily or pursuant to the requirements of law, by public officers are not admissible in evidence under the Business Entry Rule. In that light, the "test sheets" ought to have been excluded by the Trial Court.

In its decision, the United States Court of Appeals held that "even if we were to agree that these records were not admissible as business records under 28 USC 1732, their admission into evidence was harmless error." Thus, without deciding the matter, the United States Court of Appeals held that the "test sheets" being admitted was "harmless error" if error at all. In that regard, your petitioner is reminded of the language of Mr. Justice Stewart in his concurring opinion in Bruton v. United States, ___ U.S. ___, 20 L.Ed. 2d 476, decided May 20, 1968, in which he said that:

> "...certain kinds of hearsay...are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence

the minimal weight it logically deserves..."

Your petitioner respectfully urges this Court that the "test sheets" were in the category of evidence referred to by Mr. Justice Stewart. They give concrete form to matters which might otherwise be considered to be abstract and incomplete of proof. In no sense could the error in their admission be considered to be "harmless".

POINT II

THE EXHIBITION TO THE JURY OF PHOTOGRAPHIC ENLARGEMENTS OF VARIOUS HANDWRITING AND HAND PRINTING SAMPLES IS ERROR PREJUDICIAL TO THE DEFENDANT, REQUIRING A REVERSAL WHERE THE ENLARGEMENTS ARE DENOMINATED BY CONCLUSORY STATEMENTS, WHICH CONCLUSORY STATEMENTS ARE SUPPLIED BY THE PROSECUTING AUTHORITY AND ARE PRINTED IN LARGE LETTERS ABOVE THE ENLARGEMENTS CONTAINED ON THE CHARTS

In connection with the testimony of the witness SANG, the Government's handwriting expert, the Court permitted certain charts to be exhibited to the jury (Government's Exhibit 29). These charts purported to be photographic enlargements of selected portions of the "Columbia University records", on the one hand, and the suspect order forms and blanks on the other hand.

That side of the chart which purported to show portions of the "Columbia University records" was denominated, in large letters as "Known". The other portion of

the chart, purporting to show excerpts from the order forms and blanks, was denominated in equally large letters, as "Questioned".

Over the objection of the defendant, the charts were permitted to be exhibited to the jury and referred to, without any testimony being given as to the method of their preparation (R.260-261). SANG gave no testimony as to how the enlargements of the printing were made and as to whether or not they were true enlarged reproductions of printing on the documents in evidence.

The defendant objected to the use of the charts, that the designation of various parts of the chart as "Known" and "Questioned" characterized the evidence, creating the impression with the jury that various specimens of the Columbia University records were "Known" to be in the printing of the defendant SWAN (R.265).

The defendant's objections to the use of the charts was overruled (R. 265-266).

It is the contention of the defendant that the exhibition of these charts, denominated as "Known" and "Questioned", was improper and gravely prejudicial to the defendant. The defendant had the right to expect that the jury would be permitted to view all exhibits, without the exhibits' being labeled by the Government, in such fashion as to mislead the jury into believing that certain samples of printing on the Columbia University records had actually been established to be the printing of the defendant SWAN.

In its opinion, the United States Court of Appeals stated that "while it would have been better for the Assistant

United States Attorney to have had the chart labeled 'Columbia University Records' rather than 'known', we cannot say that permitting the introduction and use of the charts was an abuse of the judge's discretion, particularly as the judge gave the jury careful instructions to disregard the word 'known'".

The court's attention is once again respectfully called to Mr. Justice Stewart's concurring opinion in Bruton v. United States, supra, wherein Mr. Justice Stewart said that "...the Sixth Amendment's Confrontation Clause precludes reliance upon cautionary instructions..." Your petitioner respectfully urges this Court that the nature of the charts exhibited to the jury was such that the "jurors cannot be trusted to give such evidence the minimal weight it logically deserves, whatever instructions the trial judge might give."

POINT III

WHEN THE TRIAL COURT SUPPLIES EACH JUROR WITH A PAPER DENOMINATED AS A "QUESTIONNAIRE", WHICH SUCH "QUESTIONNAIRE" CONTAINS PRINTED INFORMATION WITH REFERENCE TO THE TRANSACTIONS CHARGED AS COUNTS IN THE INDICTMENT, BUT DOES NOT CONTAIN INFORMATION ON ALL THE ESSENTIAL ELEMENTS OF THE CRIME, PREJUDICIAL ERROR IS COMMITTED.

The Court erred in supplying each member of the jury with a "questionnaire", on which the members of the jury might record their verdict. A copy of the "questionnaire" is reproduced in the Appendix to this Petition.

The form of the "questionnaire" given to each member of the jury invades the true and proper function of the jury. It suggests to the jury that certain facts, with reference to the allegations contained in the indictment, are established and outside the purview of the jury.

For instance, the questionnaire would necessarily lead a member of the jury to assume that it had been proved that there was a letter dated "3-11-63", addressed to the Burnell Mfg. Co., in South Bend, Indiana. Since those facts are contained in a printed document, given to the jury by the court, it seems unlikely that a member of the jury would see the need for making an independent determination as to that fact.

It is the contention of the defendant SWAN that the use of the jury "questionnaire" in this case constituted a serious and harmful invasion of the jury's province by the Court, all to the prejudice of the defendant SWAN.

The United States Court of Appeals held that the submission of the "questionnaire" was a sound exercise of the trial court's discretion. The Court held that "while the summary handed to the jurors did not contain all of the essential elements of the crime, the judge carefully instructed the jury as to what it must find in order to convict and carefully read the indictment in full."

Your petitioner respectfully urges this Court to the effect that the incomplete nature of the printed "questionnaire" constituted prejudicial error, requiring a reversal. The insructions of the trial

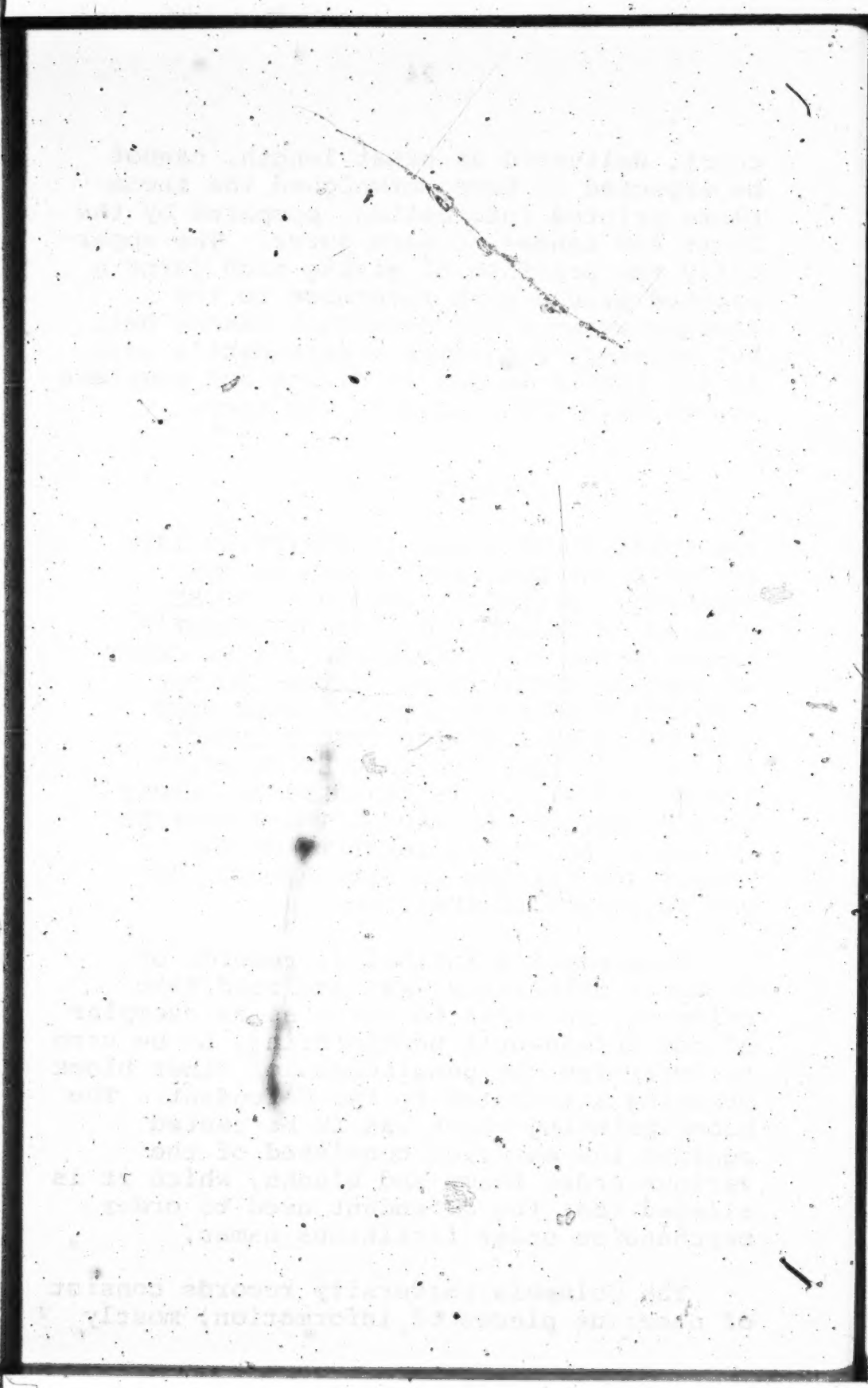
court, delivered at great length, cannot be expected to have outweighed the incomplete printed information, prepared by the Court and handed to each juror. The apparently new practice of giving each juror a printed precis with reference to the charges against the defendant cannot help but severely prejudice a defendant's case, if the precis is not in direct and complete accord with the charge to the jury.

POINT IV

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE DOCUMENTS KNOWN AS THE "COLUMBIA UNIVERSITY RECORDS", TO BE USED AS AN EXEMPLAR OF THE DEFENDANT'S HANDPRINTING AND THE UNITED STATES COURT OF APPEALS ERRED IN NOT REVERSING THE CONVICTION ON THAT GROUND. EVEN WHEN A DOCUMENT IS ADMITTED INTO EVIDENCE PURSUANT TO THE "BUSINESS ENTRY RULE" (28 USC 1732), IT IS IMPROPER TO PERMIT AN INFERENCE TO BE MADE WITHOUT FURTHER EVIDENCE, AS TO THE IDENTITY OF THE PERSON WHO PRINTED THE INFORMATION ON THE DOCUMENTS SO ADMITTED.

Government's Exhibit 3, records of Columbia University, was admitted into evidence, in order to serve as an exemplar of the defendant's handprinting, to be used to determine the genuineness of other block printing attributed to the defendant. The block printing which was to be tested against the exemplar consisted of the various order forms and blanks, which it is alleged that the defendant used to order merchandise under fictitious names.

The Columbia University records consist of numerous pieces of information, mostly



block printed. The witness SANG, an acknowledged handwriting expert, gave extensive testimony, identifying the printing on the Columbia University records with the printing on various of the order forms.

The Columbia University records were introduced into evidence through the testimony of the witness SEYMOUR (R.52-66).

SEYMOUR testified that he was familiar with the records of Columbia University and identified the various sheets of paper as official records of the University, kept in the regular order of its business. According to the Assistant United States Attorney, the Columbia University records were "intended to prove the known sample" of the defendant's printing (R. 54). The witness gave no testimony to the effect that the defendant had actually done the handprinting on the Columbia University records.

At all times, in connection with the use of the Columbia University records as exemplars of the defendant's handwriting, the prosecution and its witness SANG were concerned with the handprinting on the exemplar documents, since the order forms and blanks were also handprinted. There was never any attempt to compare the small amount of handwriting on the Columbia University records with the printed order forms. As a matter of fact, the witness SANG testified that such comparison, between script and printing, would not be proper.

After the testimony of the witness SEYMOUR, introducing the Columbia University records, the Assistant United States

Attorney announced his intention to call the handwriting expert witness, SANG, to the stand, to compare the Columbia University records with the order blanks and forms. At that point, upon objection by the attorney for the defendant, the following colloquy took place between the Assistant United States Attorney and the Court:

> "MR. WOHL: Yesterday, your Honor, I found out just yesterday that I would have a witness that could testify to the printing and would be able to identify the printing. The witness is not available this morning but will be available this afternoon. The witness is the defendant Portoghese. I want to make this known to the Court because perhaps it is a little unusual because the case started with him in it.
>
> "However, he tells me that he can identify the handwriting because he knows it quite well. I will endeavor to have him here early in the afternoon.
>
> "THE COURT: On that statement, I will allow it. I will allow the expert to testify subject to the connecting testimony.
>
> "MR. WOHL: Thank you, your Honor."

Thereafter, there was an objection by the defendant's attorney to the testimony of the witness SANG, which objection was overruled. The witness SANG took the

stand and gave testimony, comparing the Columbia University records with the order blanks and forms.

As its last witness, the Government called the co-defendant PORTOGHESE as its witness. His was to be the "connecting testimony" promised by the Government. PORTOGHESE was not questioned as to the charges made in the indictment. He gave testimony identifying certain exhibits being in his own handwriting. He testified that he had known the defendant SWAN for five years. He further testified that the only time he had seen the defendant SWAN print or handwrite on a document was when he saw the defendant SWAN sign a check (R. 333). He had never seen any other printing of the defendant SWAN (R. 333). Generally, his testimony indicated that he was not very familiar with the printing of the defendant SWAN.

When asked if he was certain that the handwriting and print on the Columbia University records was that of the defendant SWAN, PORTOGHESE answered that "I am not certain" (R. 336).

After the PORTOGHESE testimony, the defendant moved to strike Exhibit 3 (the "Columbia University records") from evidence, on the grounds that they had been received subject to connection and had not been connected. The Court denied that motion (R. 337).

The Columbia University records were admitted, for purposes of comparison with the order blanks and forms which were said to be the tools for criminal activity. They were admitted, in order to determine whether or not the handprinting on the order blanks and forms was that of the defendant SWAN.

By virtue of §1731 of Title 28, the Columbia University records were admissible for purposes of such comparison, only if they were the "admitted or proved handwriting of any person".

Certainly, the defendant did not admit that the Columbia University record contained his handwriting. In that light, the Government was put to the task of proving that the Columbia University records were in the handwriting of the defendant SWAN.

The Government failed utterly to prove that the Columbia University records, in their handprinted part, were made by the defendant. The witness SEYMOUR did not aid the Government in that regard. He merely served as the conduit, by which the Columbia University records were placed into evidence as records made in the regular course of business.

The only other testimony offered by the Government, to prove that the printing on the Columbia University records was that of the defendant SWAN, came in the person of the witness PORTOGHESE. PORTOGHESE clearly testified that he was not certain and that he had very slight knowledge of the printing of the defendant SWAN.

Research reveals no cases which indicate that the introduction of a record made in the regular course of business, pursuant to 28 USC 1732, will permit any necessary inference as to who actually wrote or printed matters contained in the business record. It appears that this is a question of Federal Law which has not been, but should be, settled by this Court.

The Trial Court erred, to the prejudice of the defendant, in admitting into evidence and, later, failing to strike from evidence, the Columbia University records, which were admitted for purposes of comparison with other handwritings. Those records were not "the admitted or proved handwriting" of the defendant SWAN.

CONCLUSION

It is respectfully submitted that the United States Court of Appeals for the Second Circuit erred in its failure to reverse the conviction of the defendant, upon each of the grounds set forth above. It is further respectfully urged that review by certiori should be granted as prayed.

Dated: Hollis, New York
July 31, 1968

Respectfully submitted,

Frederick M. Reuss, Jr.
Attorney for Petitioner

APPENDIX

OPINION OF COURT BELOW

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 434—September Term, 1967.

(Argued April 10, 1968 Decided June 3, 1968.)

Docket No. 31963

UNITED STATES OF AMERICA,

Appellee,

—against—

DONALD SWAN,

Appellant.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and KAUFMAN, *Circuit Judges.*

Appeal from judgment of conviction for mail fraud, 18 U. S. C. §1341, and conspiracy, 18 U. S. C. §371, following a jury trial in the United States District Court for the Eastern District of New York, Jacob Mishler, *J.*

Affirmed.

RONALD GENE WOHL, Assistant U. S. Attorney, Brooklyn, N. Y. (Joseph P. Hoey, U. S. Attorney, Eastern District of New York, Brooklyn, N. Y., on the brief), *for appellee.*

FREDERICK M. REUSS, JR., Hollis, New York, *for appellant.*

LUMBARD, *Chief Judge*:

Donald Swan appeals from a judgment of conviction by a jury in the Eastern District of New York on twelve counts of mail fraud and one count of conspiracy to commit mail fraud. 18 U. S. C. §§1341, 371. His main contention on appeal is that various student records from Columbia University, used as exemplars of his handwriting, were improperly received in evidence. Under the circumstances of this case we find that the Columbia University records were admissible in evidence under 28 U. S. C. §1731 for the purpose of establishing a standard of comparison to determine the genuineness of other handwriting which the Government sought to attribute to defendant. As the other points urged on appeal are also without merit, the judgment is affirmed.

The indictment charged Donald Swan and Andrew Portoghese with devising a scheme to defraud mail order vendors by ordering merchandise in 1963, 1964 and 1965 under assumed names and then failing to pay for the items they received. The Government sought to prove at trial that items ordered by Portoghese were sent to fictitious persons such as Dr. D. Swanson, Dr. Dwan, Dr. D. Wann, etc., at Swan's residence. Items ordered by Swan were allegedly sent to Portoghese's address in the name of Dr. F. Tavarro, and, by arrangement with a business associate of Portoghese's, to his business associate's address in the name of Dr. David Levy. At trial, nineteen persons testified for the Government, including Portoghese who pleaded guilty to one count of mail fraud on the second day of trial. No witnesses were called by the defense.

As part of its case, the government tried to show through the testimony of a handwriting expert that the various mail order forms used to order merchandise under the fictitious

names of "Dr. Levy" and "Dr. Tavano" had been filled out by Swan. Before calling its handwriting expert, the government introduced into evidence, through the testimony of an Assistant to the Registrar of Columbia University, Swan's 1955 application to the Graduate School of Business Administration and registration and other forms submitted to the school while Swan was a student, in 1954, 1955 and 1956, which records the University had retained in the regular course of business as part of its official records. The court received the evidence as business records under 28 U. S. C. §1732 subject to connection by the Government. Swan's counsel did not object to their admission for the purpose of proving that the signature written on the records was Swan's signature; indeed, it is admitted on appeal that the signature is Swan's signature and the pictures attached to the applications are pictures of Swan. However, defense counsel objected at length to the admission of the records for the purpose of using the writing on the records as exemplars of Swan's writing for purposes of comparison by the handwriting expert, and at the close of the government's case moved to strike both the exhibits and the handwriting expert's testimony because the documents had not been connected.

We find that Judge Mishler did not err in denying defendant's motions to strike the Columbia University records and the testimony of the government's handwriting expert. "The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person." 28 U. S. C. §1731. The government proved the genuineness of the exemplars to the satisfaction of the court. In order to secure reversal on appeal of the trial court's ruling defendant must show that the ruling was

not fairly supported by the evidence. *Citizens Bank & Trust Co.* v. *Allen*, 48 F. 2d 549, 550-551 (4th Cir. 1930); Annotation: Genuineness of Exemplar-Proof, 41 ALR 2d 575, 582 (1955); 2 Wharton's Criminal Evidence §582 (R. A. Anderson 12th ed. 1955); 7 Wigmore on Evidence §2020 (3rd ed. 1950). The defendant has failed to meet this burden.

Co-defendant Portoghese testified that the printing on the Columbia University records is "similar to Donald Swan's," and that the printing looked the same as the printing on some checks that Portoghese received from Swan. While Portoghese was not absolutely certain that the printing was Swan's, the combination of his testimony and the inference which the trial judge could draw from the nature of the papers themselves and the testimony of the Assistant Registrar was a sufficient foundation for their admission for use as an exemplar of Swan's handwriting and printing. *Butler* v. *State*, 38 Ala. App. 527, 93 So. 2d 441, cert. denied, 265 Ala. 694, 93 So. 2d 445 (1956).

The trial judge was entitled to rely in part upon the circumstantial evidence before him. *Dean* v. *United States*, 246 Fed. 568 (5th Cir. 1917). As in the *Dean* case, this court has examined the documents used as exemplars. We find that they are of such a character that there is a strong inference that they were filled out by the signer. Each of the registration cards has a space marked "STUDENT'S SIGNATURE" in which appellant admittedly wrote "Donald A. Swan." At the top of each card are instructions: "Print your name exactly as it should appear on all official records." On each card the name "Donald Arthur Swan" is printed in the same color ink as Swan's admitted signature. The body of the cards and other documents are filled out in a mixture of block printing

and script. In each case the writing is all in the same color ink and appears similar to the printed and written names. An Assistant Registrar of Columbia University testified at the trial that it is customary for students to fill out their own registration cards. This clearly is sufficient evidence from which the trial judge could infer that Swan, who admittedly signed the cards, also filled them out. See *United States* v. *Liguori*, 373 F. 2d 304 (2d Cir. 1967).

At the time the evidence was received, the trial judge instructed the jury that whether or not the writing in the Columbia University records was the script and printing of defendant Swan was a question of fact for their determination. *Williams* v. *Conger*, 125 U. S. 397, 413-415 (1888). Since defense counsel did not request the court to repeat this instruction in the charge or object to its omission, the earlier instruction during the course of the trial was sufficient. *United States* v. *Indiviglio*, 352 F. 2d 276 (2d Cir. 1965).

Appellant urges some other points which do not require extended discussion. As part of the Government's case, various so-called "test sheets" kept by a postal inspector to record facts concerning various parcels delivered to Swan's residence[1] were admitted into evidence as business

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1 Each of the so-called "test sheets" was in the form of a letter from a postal inspector to the superintendent of a post office requesting him to have the carrier making the delivery of the package indicate on the sheet the time, date and place of delivery, name of addressee and description of the person who received the package. The sheet was then returned to the postal inspector who issued it.

Before forwarding the test sheet and the package to the post office for delivery, the postal inspector recorded on the back of each test sheet the name of the person who mailed the package, date and place of mailing, the addressee and the contents of the package. The contents of each package for which a test sheet was made was marked and the method of marking was also recorded on the test sheet.

records of the Post Office Department. Appellant contends these were not business records because they were prepared in connection with litigation and should therefore not have been admitted. See *Palmer* v. *Hoffman*, 318 U. S. 109 (1943). Even if we were to agree that these records were not admissible as business records under 28 U. S. C. §1732, their admission into evidence was harmless error. The postal inspector who filled out the sheets was present at the trial and testified that he had an independent recollection of the events recorded on the sheets. Appellant had ample opportunity to test the veracity of the reports included in the test sheets by cross examination of this witness.

Appellant contends that charts exhibited to the jury in connection with the testimony of the Government's handwriting expert were prejudicial to Swan because the side of the chart showing portions of the Columbia University records was denominated "known" while the portion of the chart showing excerpts from the mail order forms was labeled "questioned," and this characterization would create the impression with the jury that the Columbia University records were known to be Swan's printing, a question reserved for the jury. While it would have been better for the Assistant United States Attorney to have had the chart labeled "Columbia University records" rather than "known," we cannot say that permitting the introduction and use of the charts was an abuse of the judge's discretion, particularly as the judge gave the jury careful instructions to disregard the word "known."[2] *United States*

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2 Before the chart was shown to the jury the trial judge instructed them: "[W]hen it comes to determining whether this was the handwriting or any part of it was the handwriting of this defendant, that is a question of fact for your determination. The mere fact that the chart says 'known writing' should not influence you by its description

v. *Ellenbogen*, 365 F. 2d 982, 988 (2d Cir. 1966), cert. denied, 386 U. S. 923 (1967).

Appellant's final contention is that he was prejudiced by the court's supplying the jurors with a "questionnaire" listing the transactions charged as counts in the indictment. Providing the jury with a list of the counts of an indictment as an aid to informed consideration by the jury is clearly proper, and usually very desirable where a multiplicity of counts are submitted for verdict. *U. S.* v. *Bozza*, 365 F. 2d 206, 225 (2d Cir. 1966). While the summary handed to the jurors did not contain all of the essential elements of the crime, the judge carefully instructed the jury as to what it must find in order to convict and carefully read the indictment in full. The jury was also instructed that the summary was not evidence but only a summary of the indictment. Furthermore, the defendant was given an opportunity to have a copy of the indictment substituted for or accompany the precis and declined both options. Under these circumstances it was a sound exercise of the trial court's discretion to provide the jury with the list describing the counts in the indictment on which they were to render a verdict.

The judgment is affirmed.

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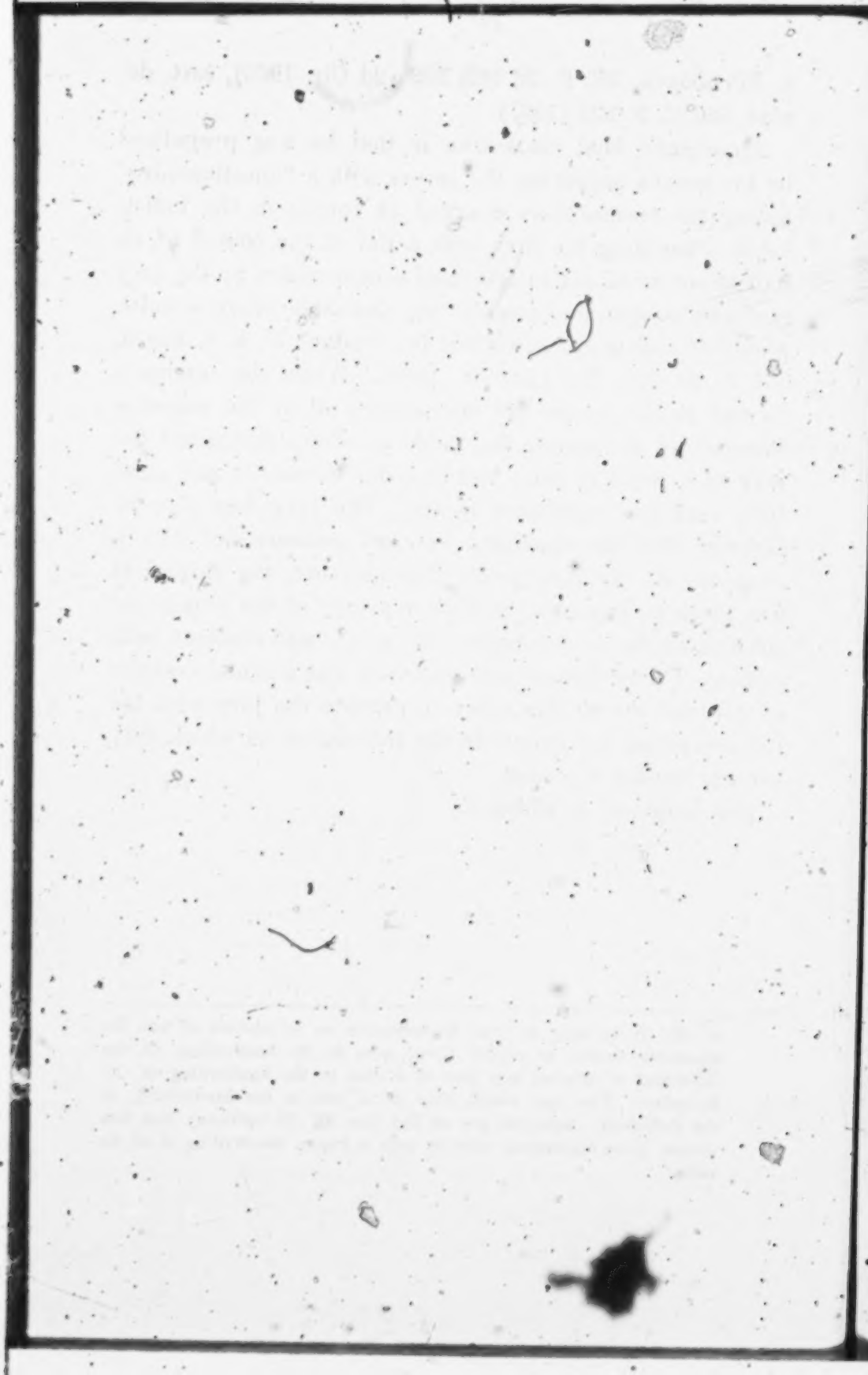
at all. In arriving at your determination as to whether or not the documents known as exhibit three, were in the handwriting of the defendant or whether any part of it was in the handwriting of the defendant. You may decide none of it was in the handwriting of the defendant. Again, if you so find then all the testimony that this witness gives concerning when he calls a known handwriting is of no value."



JURY "QUESTIONNAIRE"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 66
CR 335

UNITED STATES OF AMERICA,

-against-

DONALD SWAN,

Defendant.

Count 1. Letter 3-11-63

Bernell Mfg. Co.
801 North Michigan St.
South Bend 1, Indiana

GUILTY _____

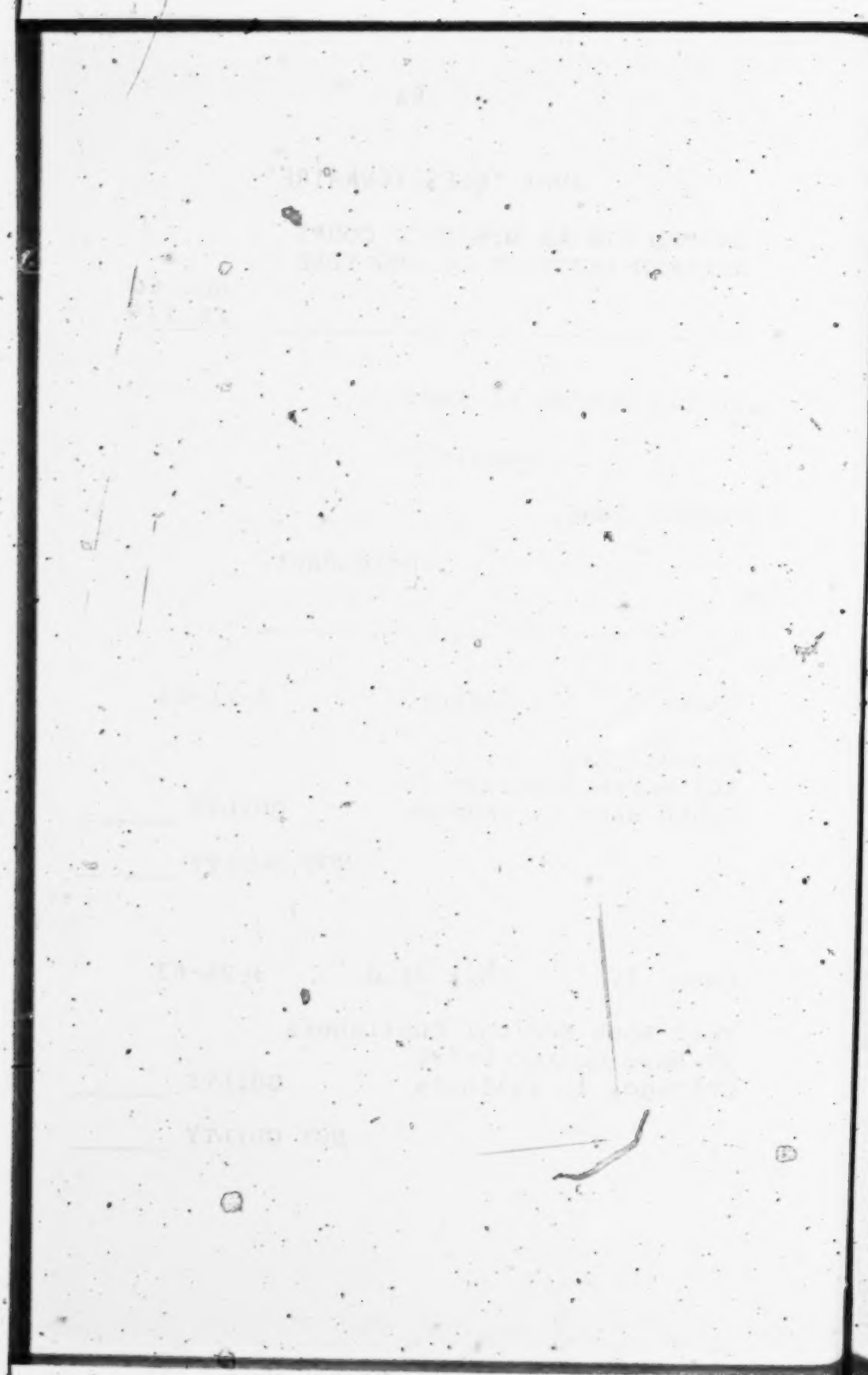
NOT GUILTY _____

Count 2. Post Card 3-26-63

Year Book Medical Publishers
35 East Wacker Drive
Chicago, 1, Illinois

GUILTY _____

NOT GUILTY _____



JURY "QUESTIONNAIRE"

Count 3. Post Card 10-31-63

Year Book Medical Publishers
35 East Wacker Drive
Chicago 1, Illinois

GUILTY _____

NOT GUILTY _____

Count 4. Post Card 10-2-64

Lea & Febiger
600 Washington Square
Philadelphia, Pa.

GUILTY _____

NOT GUILTY _____

Count 5. Post Card 11-5-64

Year Book Medical Publishers
35 East Wacker Drive
Chicago 1, Illinois

GUILTY _____

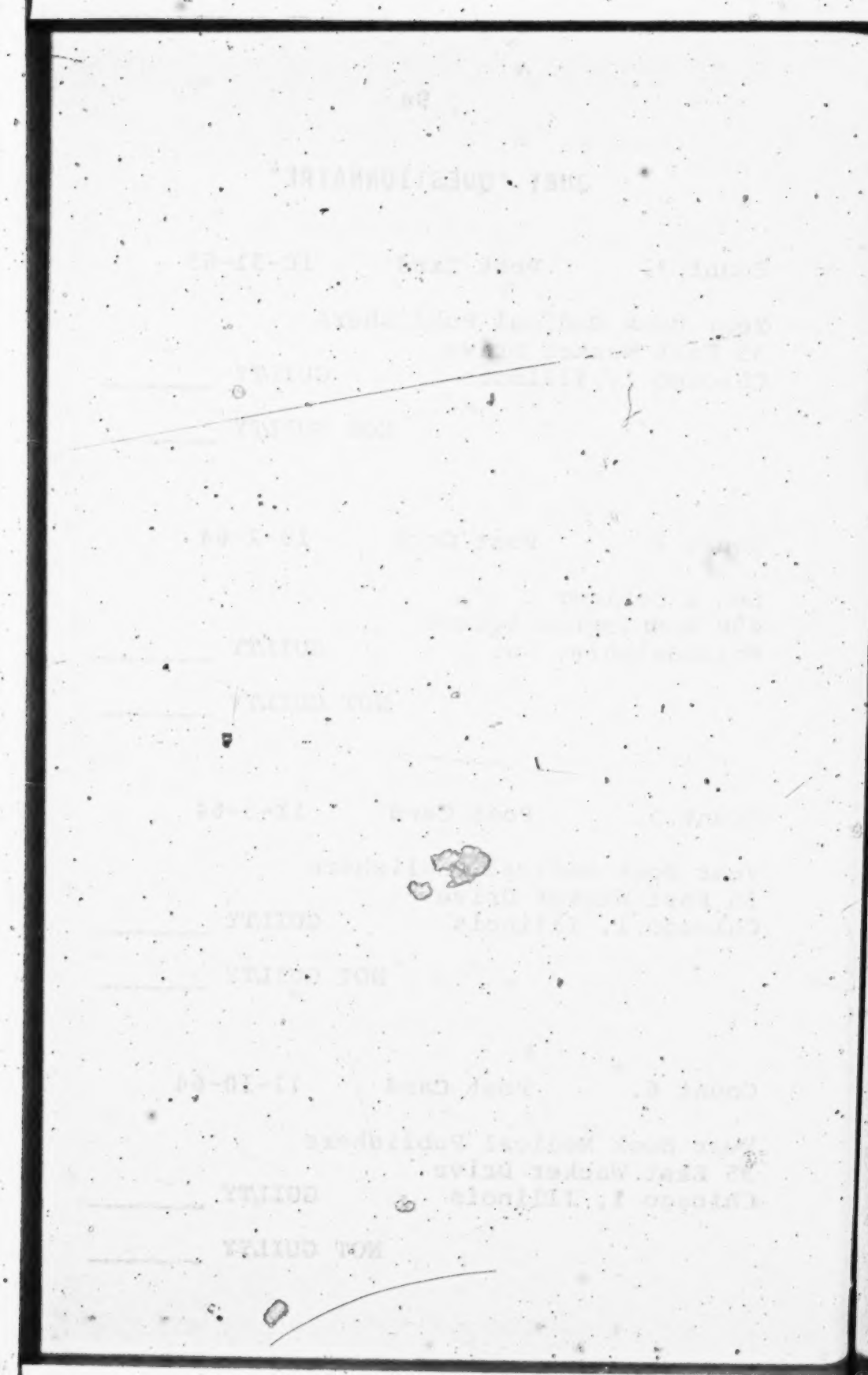
NOT GUILTY _____

Count 6. Post Card 11-10-64

Year Book Medical Publishers
35 East Wacker Drive
Chicago 1, Illinois

GUILTY _____

NOT GUILTY _____



JURY "QUESTIONNAIRE"

Count 7. Newspaper Clipping 2-10-65

The Classics Club
Roslyn, L.I., N.Y.

GUILTY _____

NOT GUILTY _____

Count 8. Magazine Clipping 2-11-65

Alamo Fruit
Alamo, Texas

GUILTY _____

NOT GUILTY _____

Count 9. Magazine Clipping 2-17-65

Classics Record Library
345 Hudson Street
New York 14, N.Y.

GUILTY _____

NOT GUILTY _____

Count 10. Magazine Clipping 3-28-65

Alamo Fruit
Alamo, Texas

GUILTY _____

NOT GUILTY _____

JURY "QUESTIONNAIRE"

Count 11. Post Card 4-5-65

Edroy Products
130 W. 29th Street
New York, New York

GUILTY _____

NOT GUILTY _____

Count 12. Post Card 12-15-65

Amsterdam Pen
Amsterdam, New York

GUILTY _____

NOT GUILTY _____

Count 13. Conspiracy

GUILTY _____

NOT GUILTY _____

Brooklyn, New York,
August 21st, 1967

_____
Foreman

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 28 1968
JOHN F. DAVIS, CLERK

No. 392

In the Supreme Court of the United States

OCTOBER TERM, 1968

DONALD SWEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 392

DONALD SWAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on twelve counts of mail fraud and one count of conspiracy to commit that offense. 18 U.S.C. 1341, 371. On January 5, 1968, he was sentenced to concurrent terms of three years' imprisonment on two counts and to concurrent terms of probation for three years on each of the remaining counts, the probation to commence at the expiration of the prison term. The court of appeals affirmed (Pet. App. 1a–7a).

Petitioner does not challenge the sufficiency of the evidence which clearly established his participation

317-662—68

in a scheme to defraud mail order vendors by ordering merchandise under assumed names and then failing to pay for the items received. See Pet. App. 2a. The issues raised in the present petition all relate to rulings of the judge at trial which, we submit, do not warrant review by this Court. Each of petitioner's contentions is fully answered by the opinion of the court below, on which we rely.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968